Petition

81-2028

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE SHELDON OLIVER ZISOOK,
Attorney-Petitioner,

IN RE JEFFREY BRODY,
Attorney-Petitioner,

IN RE BASIL CHRIS ELIAS,
Attorney-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney who engages in practice as a professional corporation can be compelled to produce his client records.

2. Whether an attorney who has asserted his Fifth Amendment privilege in response to a subpoena duces tecum may be required to establish that there was a probability his response would be incriminating rather than a possibility that it would be incriminating.

3. Whether an attorney who has asserted his Fifth Amendment privilege in response to a subpoena duces tecum may be required to establish that his response is likely to incriminate him without the protection of an *in camera* hearing, and without judicial immunity from future use of both the disclosures made *in camera*, and the fact that documents were produced for review.

TABLE OF CONTENTS

Questions Presented For Review i

Table of Authorities v

Citation to the Opinion of the Court Below . 1

Jurisdiction 1

Constitutional Provision Involved. 2

Statement of the Case. 3

Argument 11

I. THE ILLIOIS SUPREME COURT CONCLUDED THAT AN ATTORNEY PRACTICING AS PART OF A PROFESSIONAL CORPORATION HAS NO RIGHT TO ASSERT HIS PRIVILEGE AGAINST SELF-INCRIMINRATION WITH RESPECT TO RECORDS OF HIS SERVICES TO CLIENTS. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY DETERMINED BY THIS COURT, ON WHICH COURTS AND PRACTITIONERS NEED GUIDANCE. 11

A. The Records Requested In This Case 14

B. The Parameters Set By The Decisions Of The United States Supreme Court. 17

C. An Attorney's Record Of His Work On Behalf Of His Clients Constitutes Personal Papers Protected By The Fifth Amendment. 28

1. The Nature Of The Records Demanded From Mr. Zisook . . . 29

2. The Capacity In Which The Documents Are Held 35

II. THE PROCEDURE ESTABLISHED BY THE ILLINOIS SUPREME COURT BY WHICH AN ATTORNEY MUST ASSERT HIS OR HER PRIVILEGE AGAINST SELF-INCRIMINATION UNCONSTITUTIONALLY INFRINGES ON THE PRIVILEGE IN CONTRADICTION WITH THE APPLICABLE DECISIONS OF THIS COURT.42

A. The Decision Of The Illinois Supreme Court Imposes A Greater Burden Of Proof On An Individual Seeking The Protection Of His Privilege Against Self-Incrimination Than Is Permitted By The Decisions Of This Court. . . . 42

B. The Procedure Established By The Decision Of The Illinois Supreme Court Infringes On The Petitioners' Fifth Amendment Rights By Failing To Provide For In Camera Review Of The Bases For Assertion Of The Privilege, And Judicial Immunity From The Use Of The Fact That Document Were Produced In Camera, And The Use Of Any Facts Revealed In Camera 50

Conclusion 60

TABLE OF AUTHORITIES

Anderson v. Maryland, 427 U.S. 463 (1976). 26, 27

Bellis v. United States, 417 U.S. 85, 98 (1974). 11, 17, 21, 22, 23, 24, 28, 30, 32, 36

Fisher v. U.S., 425 U.S. 391 (1976). . . . 25, 26, 31, 32, 33, 57

Hoffman v. United States, 341 U.S. 479 (1951). 42, 44, 46

In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979) 48

United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981). 54

United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980) 56

United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940). 46, 54

United States v. White, 322 U.S. 694 (1944). . 20, 32

Wilson v. United States, 221 U.S. 361 (1910) . 18, 20, 32, 36, 38, 39

Statutes

Ill. Rev. Stat., Ch. 32, 6415-2 (1973) 38

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CITATION TO THE OPINION OF THE COURT BELOW

The Attorney Registration and Disciplinary Commission of the Illinois Supreme Court requested that the Illinois Supreme Court issue a Rule 20 show cause why the Petitioners should not be suspended from the practice of law for declining to comply with subpoenas issued by the Court on the ground that they might incriminate themselves. The Illinois Supreme Court issued a Rule to Show Cause in each case. (Appendix B). After receiving written responses to the Rules and hearing oral argument, the Illionis Supreme Court remanded the cases to the Commission for further proceedings consistent with its opinion. This decision is reported at _____Ill. ____, 430 N.E.2d 1037 (1981). It is included as Appendix A to this Petition.

JURISDICTION

The decision of the Illinois Supreme Court reported at ____Ill. _____, 430 N.E.2d 1037 (1981) was entered on December 4, 1981. A timely petition

for rehearing was filed, and was denied on January 29, 1982. This Petition for Writ of Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis supplied).

STATEMENT OF THE CASE

As a result of newspaper and television coverage of the Petitioners' legal practices in representing personal injury clients, both the Illinois Attorney Registration and Disciplinary Commission and a federal Grand Jury began investigations of the Petitioners. In the course of these investigations, the Commission subpoenaed certain records and documents which were also the subject of subpoenas from the grand jury. The Petitioners in due course asserted their Fifth Amendment privilege.

The Illinois Supreme Court consolidated the cases of the three Petitioners. The brief filed on behalf of Mr. Zisook in answer to the Illinois Supreme Court's rule to show cause stood as the brief on behalf of all three Petitioners. It again raised the federal questions which asre the basis of this Petition: did the Petitioners have a right to decline

compliance with the subpoenas on the basis of their Fifth Amendment privilege against self-incrimination and what is the scope of that privilege.

The Illinois Supreme Court, in its opinion, addressed both the applicability of the privilege to the Petitioners, and the procedure to invoke it. It held that "an attorney against whom a disciplinary proceeding is pending does not have a complete immunity from testifying as does a defendant in a criminal case. As a result, the attorney must appear and produce documents and at that time assert the privilege with respect to each question or document." In Re Zisook, 430 N.E.2d at 1043.

The Court ruled that the attorney's claim of privilege must then be subject to judicial

review if contested by the Commission.

The witnesses' burden to "prove" the validity of his assertion of the privilege was considered by this Court in Hoffman v. United States, 341 U.S. 479 (1951). The Illinois Supreme Court cited Hoffman; however, it also further defined this burden:

> ...[W]here a question is innocent on its face, the judge may inquire of the witness as to the origin of the claim that the question might incriminate him, and the burden is on the witness to establish the validity of his claim. (United States v. Weisman (2d Cir. 1940), 111 F.2d 260.) However, the witness is not required to prove the hazard in the sense in which a claim is usually required to be established in court. (Hoffman v. United States (1951), 341 U.S. 479, 95 L. #d. 1118, 71 S. Ct. 814; Russell v. United States (6th Cir. 1926), 12 F.2d 683, cert. denied (1926), 273 U.S. 708, 71 L. Ed. 851, 47 S. Ct. 100; Estes v. Potter (5th Cir. 1950), 183 F.2d 865, cert. denied (1951), 340 U.S. 920, 95 L. Ed. 664, 71 S. Ct. 356.) It need only be established that the answer is likely to incriminate the witness.

> In determining the validity of the witness' contention, the court shall take into consideration all of the facts and circumstances of the case. (Mason v. United States (1917), 244 U.S. 362, 61 L. Ed. 1198, 37 S. Ct. 621; Graham v. United States (9th Cir. 1938), 99 F.2d 746.) The witness shall be allowed to tender whatever proof to wishes to show that an answer might tend to incriminate him. (Alexander v. United States (9th Cir. 1950), 181 F.2d 480; Doran v. United States (9th Cir. 1950), 181 F.2d 489.) If the witness is under investigation in a criminal matter, the judge should pay added consideration to his assertions. Also, close questions should be resolved in favor of the witness. People v. Burkert (1955), 7 Ill. 2d 506; In re Holland (1941), 377 Ill. 346; People v. Rockola (1931), 346 Ill. 27; People v. Newmark (1924), 312 Ill. 625; see generally 37 Ill. L. & Prac. Witnesses § 149, at 158 (1958); 98 C.J.S. Witnesses § 54, at 303 (1957). (In re Zisook, 430 N.E.2d at 1042-3).

The opinion of the Illinois Supreme Court then set forth new procedures by which attorneys must assert their privilege in disciplinary proceedings. The attorney

must appear before the Commission in response to the subpoena and assert the privilege as to each incriminating question. In the case of a subpoena duces tecum, the witness must appear with the papers and claim the privilege with respect to specific documents. A judicial determination must then be made as to the propriety of a claimed privilege. (In re Zisook, 430 N.E.2d at 1043.)

The Court then analyzed whether Petitioners Zisook and Elias could claim the privilege with respect to the subpoenaed documents. Mr. Elias is a sole practioner. The Court therefore considered the "key question" to be whether, as an attorney, Mr. Elias "had an identity independent of Basil Chris Elias," and concluded he did not. It cited Boyd v. United States, 116 U.S. 616 (1886), and Couch v. United States, 409 U.S. 322 (1973) in holding that the privilege applies

to the business records of a sole practitioner. Therefore it ruled that Mr. Elias was entitled to claim the privilege with respect to any of the subpoenaed documents which are "likely to incriminate him."

The Court's decision with respect to the subpoena of documents from Mr. Zisook is confusing. The Court did not discuss the specific nature of the documents subpoenaed. It analyzed the attributes of a professional corporation and concluded that "employees of professional corporations do not possess the privilege against self-incrimination so far as records of the corporation are concerned." However, the Court also noted that an employee is protected from disclosing "'personal' records which may incriminate him" though he must produce "corporate records in his possession." The Court stated

that "the distinction between the two is that in the second situation the witness holds the documents in a representative, as opposed to personal, capacity. Bellis v. United States (1974), 417 U.S. 85; United States v. Nobles (1974), 422 U.S. 225; People v. Monroe (1963), 27 Ill.2d 449; see generally Annot., 52 A.L.R.3d. 19 (1980 Supp.)." (In Re Zisook, 430 N.E.2d at 1045-6).

The Court applied these principles to conclude:

> Respondent Zisook cannot claim the privilege in the corporate files of Sheldon Oliver Zisook Professional Corporation. Of course, any personal papers contained in the files are protected.

The Court's final statement with respect to Mr. Zisook suggests, however, that Mr. Zisook may not claim the privilege with respect to any of the subpoenaed documents:

> Zisook has been subpoenaed to produce certain documents of a professional corporation, as well as to appear and testify. He has failed to comply. The scope of his privilege does not extend to documents of a professional corporation. Likewise his failure to appear is an improper manner to assert the privilege as it relates to the command to give testimony.

(In Re Zisook, 430 N.E.2d at 1046) In other words, he has no substantive claim with respect to refusing documents, and followed the wrong procedure with respect to giving testimony.

The Court did not review the validity of the Petitioners' assertion of their privilege with respect to their testimony. It concluded only that their procedure for asserting it was improper.

All three cases were remanded to the Attorney Registration and Disciplinary Commission in order to set new dates for compliance with the subpoenas, according to the substantive ruling and new procedure provided in the decision.

ARGUMENT

I. THE ILLINOIS SUPREME COURT CONCLUDED THAT AN ATTORNEY PRACTICING AS PART OF A PROFESSIONAL CORPORATION HAS NO RIGHT TO ASSERT HIS PRIVILEGE AGAINST SELF-INCRIMINATION WITH RESPECT TO RECORDS OF HIS SERVICES TO CLIENTS. THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY DETERMINED BY THIS COURT, ON WHICH COURTS AND PRACTITIONERS NEED GUIDANCE.

This Court has never reached the issue of whether an attorney can be compelled to produce files concerning his representation of his clients which tend to incriminate him, when the attorney is not a sole practitioner but practices as part of an organization: a partnership, a professional corporation, or a corporation. This question was specifically reserved in the decision in Bellis v. United States, 417 U.S. 85, 98 (1974), in which an attorney was ordered to produce financial records of his partnership. In a footnote this Court commented:

> Significantly the District Court here excluded any client files from the scope of its order. See n. 1, supra. A different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership.

The Illinois Supreme Court has ruled that Petitioner Zisook must produce files containing work which he performed on behalf of his clients. This is an important federal question which this Court has not heretofore determined, though the Bellis decision clearly recognized the significance of the issue.

The decisions of lower courts have not resolved this question. The few courts which have ordered an attorney to produce client records have failed to consider the differences between financial records and client records as suggested in Bellis.

The nature of an attorney's client records and the capacity in which they are held requires that an attorney be able to resist their compelled production on the grounds that it might incriminate him or her. Any other rule would repudiate the traditional basis of the Fifth Amendment privilege and discriminate against attorneys in its assertion. Nor can there be a difference carved from the articulation of the documents requested in the subpoena. Mr. Zisook has been ordered by the Illinois Supreme Court to produce personal papers which may tend to incriminate him. It is respectfully submitted that this Court should review this erroneous interpretation of the Fifth Amendment.

A. The Records Requested In This Case.

The Illinois Supreme Court ruled that the documents subpoenaed from Petitioner Zisook were "corporate files", that may, at best, contain some personal papers. Analysis of the four subpoenas, however, reveals that at least some of the documents were obviously personal and presumptively unrelated to Mr. Zisook's practice.* The other docu-

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*The subpoenas include a demand for any check issued during a one year period from "any account in which Sheldon O. Zisook . . . had an interest" together with any document relevant

ments demanded can be divided into two groups: client files and financial records of Mr. Zisook's practice. The Court's failure to distinguish between these two types of records demonstrates a failure to appreciate an important distinction which has been drawn by this Court and other courts with respect to an individual's Fifth Amendment rights.

All four of the subpoenas demand documents related to Mr. Zisook's representation of specific clients, in particular: all documents "relating to your representation" of Freddie MacFord, Henderson Johnson and Joyce Johnson;

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*footnote continued

to those checks. This clearly includes checks, statements, and correspondence concerning Mr. Zisook's family bank account. There is no basis for the Court's characterization of these documents as "corporate." It must be assumed that this was an oversight by the Court, and the Court did not intend to compel production of these personal papers.

all documents related to "the charge made against you by Sharon A. Harper"; all documents "related to the complaints made against Sheldon O. Zisook by Terry Charles and Byndell Austin"; and checks drawn by Sheldon O. Zisook or his agents payable to Jarvis Basemore, John Burns, David Mack and Franchesca Page, individuals identified elsewhere as people who complained to the Commission about Mr. Zisook. (Emphasis added).*

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*The Commission argued before the Illinois Supreme Court that none of these people were Mr. Zisook's clients. The basis of this argument was a complaint filed with the Commission by Mr. Zisook which identified another attorney as the attorney in charge of all litigation in the professional corporation - and thus in charge of these clients. (The complaint was withdrawn subsequently.) However, the subpoenas clearly concern only Mr. Zisook' dealings with these clients. Records related to someone else's representation were not requested.

However, one of the subpoenas also requested financial documents of the professional corporation: checks issued during a one year period from "any account in which Sheldon O' Zisook, Sheldon O. Zisook, Ltd.,* or Sheldon O. Zisook P.C. had any interest."

While the decision of the Illinois Supreme Court treats these two categories of documents alike, this Court suggested in the Bellis decision that for purposes of the Petitioners' assertion of their Fifth Amendment privilege against self-incrimination, they are different.

B. The Parameters Set By The Decisions Of The United States Supreme Court.

This Court has frequently clarified the broad scope of the Fifth Amendment's privilege

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*The name under which Mr. Zisook practiced prior to becoming a professional corporation.

against self-incrimination. A few of these decisions are particularly relevant and set the parameters for consideration of this case. In Wilson v. United States, 221 U.S. 361 (1910), a grand jury subpoenaed "letter-press copy books" of a corporation, containing copies of letters and telegrams signed by its President, Mr. Wilson. The Grand Jury had already indicted Mr. Wilson and other officers and shareholders of the corporation for mail fraud. The books were regularly kept in Mr. Wilson's office, and included this personal correspondence as well as correspondence relating to the business of the corporation. Mr. Wilson refused to produce the books on the grounds that it might incriminate him. He was found guilty of contempt. This Court affirmed the finding of contempt, in part because Mr. Wilson's personal

privilege did not apply to the books:

> For there can be no question of the character of the books here called for. They were described in the subpoena as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.
>
> . . .
>
> But his personal letters were not demanded; these the subpoena did not seek to reach; and as to these no question of violation of privilege is presented.

The Court focused on the nature of the documents and the capacity in which they were held. It noted that Mr. Wilson held the documents pursuant to the authority of the

corporation, an authority subject to termination. The Court reasoned that since a corporation receives certain privileges from the state when it is chartered as a corporation, the State retains the right to investigate the corporation to assure that it is not exceeding the powers granted. This is the reserved visitorial power of the state, and an officer of the corporation holds its books subject to that power. The Court in Wilson thus held that Mr. Wilson could not assert his privilege to resist production of the papers of the corporation.

In United States v. White, 322 U.S. 694 (1944), this Court held that although records of an unincorporated association were not subject to the retained visitorial power of the state, a personal privilege was not available if they were held subject to the rights of other members

of the organization. In White a grand jury suboenaed the records of a union's collection of work permits. The custodian of the records-- an officer of the union-- refused to produce the records on the grounds that it owuld incriminte him. The Court ruled that the custodian held the records in his official capacity -- as a representative of a collective group -- not in a personal capacity. The nature of the records was such that they embodied no element of personal privacy: they were not records of individual members of the organization and were customarily open to inspection by all members. The individual custodian could thus not assert his personal privilege with respect to the records.

The decision of this Court in Bellis v. United States, 417 U.S. 85 (1974) first

raised the issue now presented to this Court: whether an attorney who practiced as part of an organization of lawyers had a Fifth Amendment right to decline production of the records of his services to clients. In Bellis an attorney was subpoenaed to produce the financial records of his former law partnership. In denying Mr. Bellis the right to assert the privilege, the Court reiterated the two interrelated principles which prevent an organization or its representative from relying on the Fifth Amendment to avoid production of its financial records. The Fifth Amendment protects against the compulsion of testimony or personal papers of a natural individual. However, when an individual holds the records of a collective entity, he holds them in a representative capacity not a personal capacity. In addition, the financial records of

a collective entity embody no element of personal privacy. An individual can have no expectation of privacy in these records. The Court analysed the attributes of Mr. Bellis' former law partnership and concluded tat it had an established institutional identity, even though there were only three partners. The financial records of the partnership were held by Mr. Bellis in a representative capacity -- not a personal one. He could therefore be compelled to produce them.

Though the subpoena in Bellis was broad enough to require the production of client records, the lower court had not ordered their production, and the issue was thus not before the Court. The Court acknowledged in a footnote tat this exclusion was "significant" because a "different case might be presented" if Mr.

Bellis had been ordered to produce files containing his work on behalf of his clients, even though for some purposes they were "partnership files." Bellis v. United States, 417 U.S. at 98, footnote 9.*

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*The Bellis decision does include a reference to professional corporations - the legal form in which Mr. Zisook practiced law. However, consistent with the scope of the Bellis decision these comments are limited to financial records:

> Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professional are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise.

Bellis v. United States, 417 U.S. at 100-101 (emphasis added).

The subsequent decision in Fisher v. United States, 425, U.S. 391 (1976), explored further when records are considered "private papers" for the purposes of the Fifth Amendment. In Fisher an individual tried to avoid the production of his accountant's records, which he had acquired and given to his attorney. The Court held that since the existence of the records and the taxpayer's possession of them were not facts which might incriminate him, and because the taxpayer had not prepared the records and could not authenticate them or vouch for their accuracy, there was no testimonial compulsion in requiring their production. There was no question that Fisher held the records in a personal capacity, however, because of the issues of the case their production did

not result in testimony by Mr. Fisher. The Court's analysis of when the compelled production of documents is "testimonial" and thus within the protection of the Fifth Amendment is relevant to this case. As Fisher emphasizes, whether the act of production itself is testimonial depends on both the nature of the records, and the issues in the criminal investigation.

A third decision of this Court emphasizes another prerequisite to reliance on the Fifth Amendment which is relevant to analysis of this case: compulsion. In Andersen v. Maryland, 427 U.S. 463 (1976) the Court held that the seizure of an attorney's business records did not violate the Fifth Amendment because their was no compulsion against the attorney. He was not forced to authenticate his records or aid in their discovery or production, as he would

have been if the records had been subpoenaed. Though he practiced law as a sole practitioner, the search was not an infringement of the Fifth Amendment because there was no compelled disclosure.

The records seized in Andersen did include "client records" -- records of his services to clients, including his handwritten memoranda. However, the Court did not consider the nature of the records because it concluded that a claim of privilege was precluded on other grounds -- the lack of compulsion.

The decisions of this Court outline the parameters for determining whether an attorney practicing as part of a collective entity can be compelled to produce his client records, but they do not address the specific question. It is an important question which requires this Court's resolution.

C. An Attorney's Record Of His Work On Behalf Of His Clients Constitutes Personal Papers Protected By The Fifth Amendment.

Research reveals no decision which has specifically discussed the question raised by this Court in its footnote in Bellis: does an attorney have a right to resist the compelled production of files containing work which he personally performed on behalf of his clients, even if the files might, for some purposes, be viewed as those of the organization in which he practices. In this case, however, the Illinois Supreme Court has required production of an attorney's client files without adequate consideration of their nature and the capacity in which they are held. The basic principles enunciated by this Court require that an attorney practicing in a professional

corporation be permitted to decline the production of such records on the grounds that he might incriminate himself. For purposes of the Fifth Amendment the records of an attorney's work for his or her client are by nature private papers. These papers are held in his individual capacity as an attorney, not as a representative of the interests of an organization.

1. The Nature Of The Records Demanded From Mr. Zisook.

Mr. Zisook was commanded to produce essentially every record of his relationship with certain clients. This includes his letters, as well as memoranda and notes. By their nature, the subpoenaed documents are personal papers, not "corporate documents". They necessarily reflect his thoughts and opinions, perhaps critical evaluation of his success in handling the case, of his client, his adversary,

or the trier of fact. This is clearly testimony "from his own lips". Unlike the financial records in Bellis or the workpapers of an accountant, these documents reflect the personal thoughts and evaluations of the attorney, the substance of his actions in the course of his relationship with his client. They are thus "testimonial" in a way that financial records are not. Many of these records are created solely for the attorney's own use, at his discretion, and can be destroyed at his discretion. These characteristics further demonstrate the personal nature of the documents subpoenaed. If compelled to produce such documents, created in the course of an attorney-client relationship, the attorney would be compelled to give testimony against himself. His production of these records

would authenticate them; it would be the equivalent of being forced to take the witness stand.

An attorney's client files--in particular the files demanded of Mr. Zisook--may also contain documents authored and created by others. While the production of these records would not prove their genuineness, just as the taxpayer's production of the accountant's records in Fisher could not authenticate them, there is another type of testimony inherent in the act of production. Mr. Zisook's production of these records would be testimony of their existence, of his possession of them, and his belief that they are the documents described in the subpoena. These elements of testimonial complusion always exist in the production of documents, as this Court noted in Fisher. Under the

circumstances in Fisher, however, the taxpayer's admission that his accountant's workpapers existed, and were in his possession did not constitute incriminating testimony. Their existence and location were "a foregone conclusion". The papers were the kind "usually prepared by an accountant working on the tax returns of his client", and there was nothing illegal about seeking accounting help in the first place or obtaining the accountant's workpapers. Fisher v. United States, 425 U.S. at 412.

Similarly, as this Court noted in Fisher, the existence and possession of the subpoenaed documents was not in issue in Wilson v. United States, 221 U.S. 361 (1911); United States v. White, 322 U.S. 694 (1944); or in Bellis v. United States 417 U.S. 85 (1974).

In contrast, in Mr. Zisook's case the mere existence of certain documents or his possession of them may be incriminating. Their existence and location is not a foregone conclusion, as in Fisher.* And unlike Fisher, the request or knowledge of their preparation as well as their possession may be unlawful. As a result, the very act of production would be the equivalent of compelled testimony irrespective of the contents of the documents. This compulsion is protected against by the Fifth Amendment, and thus the Illinois Supreme Court

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*In his concurring opinion in Fisher Justice Marshall suggests an appropriate test: "there would appear to be a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence." Fisher v. United States, 425 U.S. at 433.

erroneously denied Mr. Zisook's claim of privilege.

The nature of the documents created by Mr. Zisook demonstrates that they are private papers protected by the Fifth Amendment. In addition, under the facts and circumstances of this case, the compelled production of the documents in Mr. Zisook's client files which are authored by others would also be testimonial. The very act of production would result in the admission of their existence and their possession by Mr. Zisook--facts which may be incriminating. These conclusions follow from the precedents of this Court; however, they have not been enunciated by this Court, or lower courts. For this reason, certiorari should be granted in order to resolve this

important question of federal law, and correct the court's erroneous interpretation of the law in this case.

2. The Capacity In Which The Documents Are Held.

The decisions of this Court applying the Fifth Amendment rely not only on the nature of the documents subpoenaed, but on the capacity in which they are held. In this case, by virtue of Mr. Zisook's personal relationship with his clients, he holds the records of his work for his clients in an individual capacity, for purposes of the Fifth Amendment.

Two preliminary principles of law guide the analysis of the capacity in which Mr. Zisook holds these files. First, the mere fact that these records were created, or came into Mr. Zisook's possession, while

he was an employee of a corporation does not make them corporate records held in a representative capacity. Even an employee of an ordinary business corporation may create personal papers during the course of his employment, as this Court recognized in Wilson v. United States, 221 U.S. 361 (1910) (personal letters of the President included in the corporation's letter press copy books could not be compelled.)*

Secondly, as this Court recognized in Bellis v. United States, 417 U.S. 85, 98 (1974), it is not necessary to conclude that for all purposes Mr. Zisook's client records are

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*It is also notable that there is no state law which places legal ownership of these records in the organization as there was in Bellis.

held in his individual capacity. These files may have a dual nature. They may be partnership files for some purposes, even though for purposes of the Fifth Amendment they are held by Mr. Zisook in his individual capacity.

By virtue of the commands of his profession, an attorney's relationship to his client is a personal one which cannot be compromised by or subject to the requirements of a professional organization. An attorney represents a client in his individual capacity, not as a representative of an organization. He is the fiduciary of his client, and this personal relationship predominates over the legal form in which he practices. The legislature of the State of Illinois specifically noted this in its statement

of intent in the "Professional Services Corporation Act" Ill. Rev. Stat., CH. 32, §415-2 (1973):

> It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public . . . while preserving the established professional aspects of the personal relationship between the professional person and those he serves professionally. (emphasis added).

As a direct result of the personal nature of an attorney's relationship to his client, the records of his work for his client are held by him in his individual capacity as an attorney, not in a representative capacity as an employee or officer of the organization. It is this factor which distinguishes the records subpoenaed from Mr. Zisook from the records subpoenaed in Wilson v. United States, 221 U.S. 361 (1910). In both cases an individual

was asked to produce his own correspondence. In Wilson, however, the letters represented "business transacted for the benefit of [a] group of individuals whose association [had] the advantage of corporate organization." Mr. Wilson was at all times "subject" to the direction of the corporation, and the books containing his correspondence were "under its control." Wilson v. United States, 221 U.S. at 382. In other words, his actions and the correspondence implementing them, were not severable from his role as a corporate employee. In contrast, while Mr. Zisook may have had certain obligations as a corporate employee the records subpoenaed in this case reflect his dealings with his clients and derive solely from his role as an attorney--a role necessarily individual and severable from the control or influence of the professional corporation.

The logic of this distinction is reinforced by the fact that the advantages of becoming a professional corporation have no effect on an attorney's relationship or obligation to his clients. Mr. Zisook's relationship to his clients, and the records of that relationship are indistinguishable from the relationship of a sole practitioner to his clients, or the records which document it. The capacity in which Mr. Zisook holds his client files is thus no different from the capacity in which Mr. Elias, a sole practitioner, holds his client files. The Illinois Supreme Court holds that the benefits of incorporation exact a price: the individual professional is stripped of his personal privilege of self-incrimination with regard to his client files. This conclusion ignores the uniquely individual

capacity in which an attorney necessarily practices his profession--a capacity which cannot be abridged by the economic aspects of an attorney's legal practice. This Court has recognized that the representative capacity in which an individual holds records of his activities on behalf of a business corporation deprives the individual of the right to claim a personal privilege as to those records. However, it has never held that a professional who holds records of his activities on behalf of a client is deprived of his right to claim a personal privilege as to those records. As a result of the uniquely individual and personal responsibility of an attorney to his client, unaffected by the form in which the economics of his practice are organized, the records of his work on behalf of his client are held by him in his individual capacity.

II.

THE PROCEDURE ESTABLISHED BY THE ILLINOIS SUPREME COURT BY WHICH AN ATTORNEY MUST ASSERT HIS OR HER PRIVILEGE AGAINST SELF-INCRIMINATION UNCONSTITUTIONALLY INFRINGES ON THE PRIVILEGE IN CONTRADICTION WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Of The Illinois Supreme Court Imposes A Greater Burden Of Proof On An Individual Seeking The Protection Of His Privilege Against Self-Incrimination Than Is Permitted By The Decisions Of This Court.

A second ground for the grant of certiorari in this case is that in two respects, the decision of the Illinois Supreme Court is not in accord with the applicable decisions of this Court. First, while the Illinois court cites Hoffman v. United States, 341 U.S. 479 (1951) in its explanation of the nature of a witness' burden in proving his right to assert the privilege, it ignores its holding.

In Hoffman, this Court reviewed the contempt conviction of a grand jury witness

who refused to answer certain questions on the grounds that the answers might incriminate him. In reversing the conviction, this Court described the degree of hazard which must be evident before a witness' refusal to answer will be upheld:

> It is for the court to say whether his silence is justified . . . and to require him to answer if "it clearly appears to the court that he is mistaken." However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually reuqired to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Hoffman v. United States, 341 U.S. at 486-7.

The court then reviewed the particular circumstances of the case and concluded:

> In this setting it is not "perfectly clear from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency" to incriminate.

Hoffman v. United States, 341 U.S. at 488 (emphasis in the original). In other words, it need only be evident that there is a possibility that the answers of a witness would incriminate him. The privilege is available if the answer "might be dangerous."*

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*In a different context this Court has ruled that the mere "possibility" of incrimination would not support reliance on the privilege. In California v. Byers, 402 U.S. 424, 427-28 (1971) this Court upheld a state statute requiring a driver involved in an accident to stop and give his name and address. The fact that such information could possibly provide information leading to criminal prosecution did not violate the Fifth Amendment

The Illinois Supreme Court, however, required a higher burden of proof in this case. It held that witnesses such as the petitioners must estabish that self-incrimination is probable not just possible:

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*continued because the information was neutral on its face, the statute was directed to the public at large--not any inherently suspect group--, and the information was indispensable to fulfillment of the statutory purpose which was, itself, not criminal. In contrast, no state statute required the petitioners to report the specific facts withheld; the information sought was not "neutral on its face"; and the individuals subject to the inquiry were not "the public at large" but attorneys under investigation for misconduct. Thus the discussion in California v. Byers does not alter the applicability of the Hoffman standards to this case. The situation of these petitioners is similar to that of the grand jury witness in Hoffman, not the defendant in Byers.

> However, where a question is innocent on its face, the judge may inquire of the witness as to the origin of the claim that the question might incriminate him, and the burden is on the witness to establish the validity of his claim. . . . However, the witness is not required to prove the hazard in the sense in which a claim is usually required to be established in court. . . . It need only be established that the answer is likely to incriminate the witness. In re Zisook, 430 N.E.2d at 1042.

The language of the Illinois court's opinion comes from the decision in United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940) ("Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects.") However, this decision antedates Hoffman, and its definition of the burden is implicitly overruled.

In requiring the petitioners to establish that their answers--or documents-- are "likely to incriminate" them, the Illinois court requires proof that the answers will probably incriminate the witness*. This is a higher standard of proof than that enunciated and approved by this Court, and consequently, infringes the petitioners' Fifth Amendment rights. It impermissibly requires them to surrender some of the protection which the privilege is designed to guarantee.

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*"Likely" when used as an adjective means "of such a nature or so circumstanced as to make something probable." Webster's Third New International Dictionary (1976) G & C. Merriam Co. Mass.

The distinction between these two standards is not insignificant. It has been recognized by lower courts. For example, in In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979) the Seventh Circuit reversed a finding of civil contempt because the district court had evaluated the witness' claim of privilege on the basis of the probability that his answers would incriminate him, rather than the possibility that they would:

> . . . we cannot agree that a witness' constitutional privilege against self-incrimination depends upon a judge's prediction of the likelihood of prosecution. Rather, we conclude that it is only when there is but a fanciful possibility of prosecution that a claim of fifth amendment privilege is not well taken. When a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.

The Seventh Circuit noted, that its holding was consistent with several other federal circuits:

> In sum, we agree with the Ninth Circuit Court of Appeals that the right to assert one's privilege against prosecution "does not depend upon the liklihood, but upon the possibility of prosecution." In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974) (emphasis in original)
>
> * * *
>
> In so holding we align ourselves with the law of the First and Second Circuit Courts of Appeals and that of a district court in California. United States v. Johnson, 488 F.2d 1206 (1st Cir. 1972); United States v. Miranti, 253 F.2d 135 (2d Cir. 1957); Priebe v. World Ventures, Inc. 407 F. Supp. 1244 (C.D. Cal. 1976).

The decision of the Illinois Supreme Court rests the petitioner's Fifth Amendment rights on the subjective evaluation of a circuit court judge as to the likelihood or probability that the answers or documents will be incriminating. This Court, and several federal courts following its dictates, have held that the availability of the privilege must depend instead on an objection determination of the possibility that the answers or documents will be incriminating. Certiorari is required in this case to correct an erroneous application of this Court's decision.

B. The Procedure Established By The Decision Of The Illinois Supreme Court Infringes On The Petitioners' Fifth Amendment Rights By Failing To Provide For In Camera Review Of The Bases For Assertion Of The Privilege, And Judicial Immunity From The Use Of The Fact That Documents Were Produced In Camera, And The Use Of Any Facts Revealed In Camera.

The procedure established by the Illinois Supreme Court in this case by which an attorney's

assertion of the privilege is reviewed is inconsistent with this Court's protection of Fifth Amendment rights because it fails to provide any confidentiality for the documents presented for review and the petitioner's testimony as to the bases of his assertion of the privilege. The decision of the Illinois court in this regard provides:

* * *

> a witness wishing to claim the privilege must appear, as commanded, and claim the privilege as to each incriminating question. At this point the Commission may seek a judicial determination of the validity of the claimed privilege. To facilitate obtaining a judicial determination. . . the Commission [will request] a judicial determination from the chief judge of the circuit in which the proceeding is being conducted, who will then designate a judge to hear the matter. (The witness shall appear before the designated judge, who will then determine whether the assertion of the privilege was justified.

* * *

> The same is true for a subpoena duces tecum. The witness must appear with the papers, and a similar judicial determination must be made as to the propriety of a claimed privilege. In re Zisook, 430 N.E.2d at 1043.

In ordering the petitioners to comply with this procedure the Court has failed to assure that they will not sacrifice their privilege against self-incrimination in attempting to prove their right to rely on it. The Court fails to require that any proof regarding a witness' refusal to answer certain questions be made in camera, outside the presence of counsel for the Commission, or that the record of the petitioner's proffer be sealed. Nor does the decision require that documents for which a petitioner claims a privilege be produced for in camera inspection only, outside the presence of the Commission's counsel,

or that any record of the proffer be sealed. In addition the court fails to protect the petitioner from future use of the fact that some documents were produced, irrespective of their contents. Without these protections both the content of the oral and documentary proffers and the fact that documents were produced may be used against the petitioners in a criminal case in violation of the Fifth Amendment.

A witness who must establish his right to assert his privilege against self-incrimination is faced with a paradox. While this Court has required that a witness may not be required to prove the hazard in the usual sense, because to do so he would be compelled to surrender the privilege, he must nevertheless make it "evident" to the court that he is entitled to the privilege. Judge Learned

Hand describes the practical problems of this dilemma in United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940):

> Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.

Courts have recognized the risks to a witness of proving the "hazard". They have responded by assuring that the information disclosed to prove that answers or documents are incriminating is protected from disclosure.

For example in United States v. Cuthbertson, 651 F.2d 189 (3rd Cir. 1981), a

criminal defendant sought discovery of materials which a television station claimed were protected by a qualified privilege under the First Amendment. The court on review ordered an in camera inspection of the television film to determine if it contained statements which would be useful to the defendant for impeachment. In a concurring opinion a judge of the Third Circuit Court of Appeals discussed the importance of in camera inspection:

> By employing this protective device, the person opposing disclosure can obtain an impartial determination of whether the documents contain material that is producible under the subpoena and, in the case of a qualified privilege, whether such material is subject to disclosure under an appropriate balancing test. In camera inspection provides for this determination without causing the documents to lose their confidential status. In order to protect expectations of confidentiality, we have recognized a judicially created privilege

that attaches to information disclosed in the course of an in camera proceeding.

In United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980) the Fifth Circuit also discussed the value of an in camera hearing. In Goodwin the district court accepted a blanket assertion of the privilege against self-incrimination by two witnesses. On review the court reversed, on the ground that the district court was required to determine the validity of the assertion. The Courtof Appeals prescribed the procedure which should have been followed:

> Better results can be obtained if a trial judge conducts a hearing with the witness in his chambers out of the jury's presence. In such a hearing the witness need not reveal the details of his possible liability. But he must describe in general terms the basis of the liability actually feared. A record can be made that is separate from the record kept of the proceedings in the courtroom. This record could be sealed and opened only for appellate review, if necessary. Such an in camera hearing in this case could have informed both the trial judge and this Court.

Only if the information disclosed by the petitioners in establishing their privilege is presented in camera, and the record of it sealed and immunized from future use, will their Fifth Amendment rights be fully protected. This procedure imposes no burden on the court, yet the Illinois Supreme Court has failed to provide this elementary protection.

In addition, the Illinois Supreme Court's procedure fails to protect petitioners Zisook and Elias from the loss of their privilege by future use of the fact that documents were produced, irrespective of their contents. This Court has recognized that there is testimony inherent in the act of production. Fisher v. United States, 425 U.S. 391, 410 (1975). If the petitioners followed this procedures described in the opinion of the Illinois Supreme Court they would be required

to produce documents in open court. Even if the contents of the documents were protected from disclosure, and any additional proof of their incriminating nature was protected from disclosure, the petitioners would have been compelled to admit that some of the documents subpoenaed from them existed and were in their possession. These facts alone may be incriminating. They may provide a link in a chain of evidence being developed by the federal grand jury investigating Mr. Zisook and Mr. Elias. These petitioners would have thus been compelled to give self-incriminating testimony in violation of their Fifth Amendment rights. For the same reason, even if the documents were produced solely in camera the fact that documents were produced must be immunized from future use to protect the petitioner's rights.

The failure of the Illinois Supreme Court to provide these protections is inconsistent with the fundamental decisions of this Court which describe the scope of the Fifth Amendment's protections. The Illinois Supreme Court claimed to be establishing an new procedure by which attorneys such as the petitioners could present their Fifth Amendment claims. However, it clearly failed to protect the petitioners from sacrificing their rights in the process of establishing them pursuant to that procedure. The petitioners cannot assume that the court intended protections which it did not provide in this explicit procedure. Nor can they assume that the circuit judge who hears their claims will amend this new procedure to fully protect their constitutional rights.

The grant of certiorari by this Court is necessary to preserve the integrity of the petitioners' Fifth Amendment rights as this Court has defined them.

CONCLUSION

For the reasons set out above, petitioners respectfully submit that this Petition for Writ of Certiorari should be granted and the decision of the Illinois Supreme Court should be reviewed.

Respectfully submitted,

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Appendix

APPENDIX A

Docket Nos. M.R. 2517, M.R. 2536, M.R. 2552
cons.--Agenda 1--March 1981.

In re SHELDON OLIVER ZISOOK, Attorney, Respondent.
--In re JEFFREY A. BRODY, Attorney, Respondent.
--In re BASIL CHRIS ELIAS, Attorney, Respondent.

MR. JUSTICE RYAN delivered the opinion of the Court:

These disciplinary cases concern the scope of an attorney's fifth amendment privilege against incriminating himself during proceedings before the Attorney Registration and Disciplinary Commission. The attorneys, Sheldon Oliver Zisook, Jeffrey A. Brody and Basil Chris Elias (respondents), received subpoenas to testify concerning certain matters issued at the request of the Attorney Registration and Disciplinary Commission (Commission). The subpoenas duces tecum received by Zisook and Elias also requested the production of certain documents. Each respondent, through his attorney, informed the Commission that he believed such testimony or the production of materials to be self-incriminating and thus failed to appear before the Commission at the time appointed. The Commission filed a report with this court pursuant to our Rule 754 (73 Ill.2d R. 754). We issued a rule to show cause why the attorneys should not be suspended from the practice of law for failing to comply with the subpoenas. Each respondent answered the rule to show cause, and the cases were consolidated, briefed and orally argued before this court.

A Federal grand jury became interested in the respondents following references to them in a newspaper-television investigative article entitled "The Accident Swindlers." The grand jury was investigating possible violations of certain Federal criminal statutes.

Respondent Sheldon Zisook is an attorney licensed to practice law in Illinois. On June 17, 1970, he formed a professional corporation, Sheldon Oliver Zisook Professional Corporation. The Commission commenced an investigation of Zisook in late 1979. A subpoena duces tecum was issued commanding the respondent to appear before the administrator of the Commission and to produce all files and documents in his possession relating to his representation of certain named clients. The subpoena also commanded Zisook to appear and give evidence.

Following the issuance of the first subpoena, the respondent sought and obtained a continuance. During that time the respondent received a subpoena issued by the United States District Court for the Northern District of Illinois. That subpoena commanded respondent to appear before a special grand jury of that court and to produce substantially all his records and files for the preceding four years. The documents sought by the grand jury included those already requested by the Commission.

The second respondent, Jeffrey A. Brody, is an attorney employed by Sheldon Oliver Zisook Professional Corporation. Like Zisook, he was mentioned in the television series "The Accident Swindlers" and received a subpoena duces tecum issued by the United States District Court for the Northern District of Illinois.

Some time later the Commission also began an investigation of Brody. It issued a subpoena requiring the respondent to appear before the Commission to give testimony. The subpoena did not require the production of documents. Brody failed to appear as commanded, claiming, as Zisook had, that to comply would result in the respondent's incriminating himself.

The third respondent, Basil Chris Elias, is an attorney apparently engaging in the practice of law as a sole practitioner. Like the other respondents, he was subpoenaed to appear before the Federal grand jury as the result of allegations against him in the aforementioned television series. Also, like Zisook, this respondent's subpoena duces tecum commanded him to appear before the Commission to testify and also to produce certain documents relating to his practice. He refused to do so, claiming it would be a violation of his privilege against self-incrimination.

We first consider the scope of and procedure for claiming the fifth amendment privilege as it relates to subpoenas requesting appearances in disciplinary proceedings. We conclude, as to the respondents, that while they possess the privilege against self-incrimination, refusing to appear in response to a subpoena is an inappropriate way to claim it.

The United States Constitution provides:

"No person sh 1l be *** compelled in any criminal case to be a witness against himself ***." (U.S. Const., amend V.)

This privilege has also been incorporated in the Illinois Constitution. (See Ill. Const. 1970, art. I, § 10.) The privilege essentially means that no person, without proper immunity, can be required to implicate himself in a crime. Malloy v. Hogan, (1964), 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489; Murphy v. Waterfront Com. (1964), 378 U.S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594; see generally Ullmann v. United States (1956), 350 U.S. 422, 100 L. Ed. 511, 76 S. Ct. 497.

The privilege does not, however, prevent the use of information voluntarily supplied by the witness (United States v. Weber (3d Cir. 1970), 437 F.2d 327, cert. denied (1970), 402 U.S. 932, 38 L. Ed. 2d 867, 91 S. Ct. 1524; People v. Jackson (1970), 130 Ill. App. 2d 170) or information supplied by a third party. It has long been recognized that the privilege extends to private papers as well as oral testimony. (United States v. White (1944), 322 U.S. 694, 88 L. Ed. 1542, 64 S. Ct. 1248; Boyd v. United States (1886), 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524.) These constructions of the privilege have developed in the context of criminal proceedings. In the cases at bar, however, the privilege is being claimed in disciplinary proceedings.

Such proceedings are typically considered to be sui generis or quasi-criminal. (In re Ruffalo (1968), 390 U.S. 544, 551, 20 L. Ed. 2d 117, 122, 88 S. Ct. 1222, 1226.) Older interpretations of the fifth amendment restricted its application to purely criminal, as opposed to noncriminal matters. It has not been until more recently that the emphasis regarding applicability has switched to the nature of the statement and resulting sanctions rather than focusing on the nature of the proceeding. (In re Gault (1967), 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428). Fifth amendment protection has been extended to statements made in the course of disciplinary proceedings. (Spevack v. Klein (1967), 385

U.S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625.) See generally Underwood, The Fifth Amendment and the Lawyer, 62 Nw. U.L. Rev. 129 (1967); Black, The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 200 (1967-68); Discussion of Recent Decisions, 18 Syracuse L. Rev. 861 (1967).

In Spevack, a disbarment proceeding was brought against a member of the New York bar, on a charge of refusing to honor a subpoena duces tecum. The attorney had refused to produce the demanded financial records and refused to testify. His sole defense was that the production of the records and his testimony would tend to incriminate him. The Appellate Division of the New York Supreme Court ordered the petitioner disbarred, holding that the constitutional privilege against self-incrimination was not available to him as a lawyer. The United States Supreme Court reversed. In concluding that disbarment fell within the fifth amendment definition of "penalty" the plurality opinion stated:

> "*** '[P]enalty' is not restricted to fine or imprisonment. It means *** the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ***." (Spevack v. Klein (1967), 385 U.S. 511, 515, 17 L. Ed.2d 574, 577, 87 S. Ct. 625, 628 (opinion of Douglas, J., joined by Warren, C.J., and Black and Brennan, JJ.).)

(See generally, Comment, The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings. Whatever Happened to Spevack? 23 Vill. L. Rev. 127 (1978).) The plurality also stated:

> "*** We conclude that *** the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." (Spevack v. Klein (1967), 385 U.S. 511, 514, 17 L. Ed.2d 574, 577, 87 S. Ct. 625, 627 (opinion of Douglas, J., joined by Warren C.J., and Black and Brennan, JJ.).)

Thus the holding in Spevack extends the cloak of the fifth amendment privilege to the respondents herein.

While extending the scope of the Fifth Amendment, Spevack does not define the means of asserting the privilege. Although a witness has a fifth amendment privilege, when there are reasonable grounds to fear self-incrimination, the privilege should not exist where the claim is unfounded. (See People v. Zazove (1924), 311 Ill. 198; Manning v.

Mercantile Securities Co. (1909), 242 Ill. 584; see generally, 98 C.J.S. Witnesses §454, at 299 (1957).) An unreasonable fear or mere reluctance to answer should not be grounds for claiming the privilege, and if sole discretion for asserting the privilege rests with the witness, there is a substantial opportunity for abuse. Underwood, The Fifth Amendment and the Lawyer, 62 Nw. U. L. Rev. 129, 134 (1967); Niles and Kayes, Spevack v. Klein; Milestone or Millstone in Bar Discipline?, 53 A.B.A. J. 1121, 1126 (1967).

The State, the legal profession and this court have significant interests in maintaining the integrity of the bar in Illinois. So vital is this interest that attorneys are expected to assist the Commission. This court has stated:

> "The choice of silence is not open to him [an attorney] if he is to reamin an officer of the court." (In re Royal (1963), 29 Ill.2d 458, 460.)

(See also In re Krasner (1965), 32 Ill.2d 121.) Although Royal and Krasner were decided before the holding of the United States Supreme Court in Spevack v. Klein, that decision has not completely deprived those prior holdings of this court of their vitality. Inasmuch as an attorney is an officer of this court and is licensed by this court to exercise the privilege of practicing law, an attorney has an obligation to cooperate with this court and its

agency, the Attorney Registration and Disciplinary Commission, in the performance of its duty to police the legal profession in this State. To allow an attorney to claim the privilege, especially when he is the primary source of information, severely hinders the effort of the Commission. Thus a conflict exists between the rights of a witness and the needs of the Commission and of this court.

Confronted by a similar dilemma, Chief Justice John Marshall, sitting as a member of the circuit court, wrote:

> "When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded." United States v. Burr (C.C. Va. 1807), 25 Fed. Cas. 38, 39-40 (no. 14692e).

We also must strike a balance which both satisfies the needs of the Commission and protects the rights of the witness. Due to the conflicting interests, as well as to the potential for abuse, we find that in attorney disciplinary hearings it is inappropriate to vest

complete discretion solely in the witness in applying the privilege against self-incrimination. Rather, the issue must ultimately be resolved by the court.

This position is consistent with holdings in other proceedings in which courts regularly have found that it is not for the witness alone to decide whether a matter is incriminating. (Mason v. United States (1917), 244 U.S. 362, 61 L. Ed. 1198, 37 S.Ct. 621; Hoffman v. United States (1951), 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814; Rogers v. United States (1951), 340 U.S. 367, 95 L. Ed. 344, 71 S. Ct. 438; see generally Annot., 95 L. Ed. 1126 (1950).) It is for the court to decide whether his fear of incrimination is well founded. Rogers v. United States (1951), 340 U.S. 367, 95 L. Ed. 344, 71 S. Ct. 438; Hoffman v. United States (1951), 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814; Abrams v. United States (2d Cir. 1933), 64 F.2d 22; Miller v. United States (9th Cir. 1938), 95 F.2d 492; Camarota v. United States (3d Cir. 1940), 111 F.2d 243, cert. denied (1940), 311 U.S. 651, 85 L. Ed. 416, 61 S. Ct. 16; Estes v. Potter (5th Cir. 1950), 183 F.2d 865, cert. denied (1951), 340 U.S. 920, 95 L. Ed. 664, 71 S. Ct. 356; People v. Bukert (1955), 7 Ill.2d 506; People v. Zazove (1924), 311 Ill. 198; People v. Schultz (1942), 380 Ill. 539.

In In re March (1978), 71 Ill.2d 382, 399, this court considered a related question to the one now before us. The holding in that case

does not apply until it is determined that a valid fifth amendment privilege has been asserted. We are here concerned with the method of determining if the assertion of the fifth amendment privilege is in fact "valid." The cases cited above have held that such a determination is not to be left solely with the one claiming the privilege, but is to be judicially made. Once it is determined that the claimed privilege is valid, then March is applicable.

Inasmuch as disciplinary hearings are not presided over by a member of the judiciary, in order to secure a judicial determination as to the propriety of the asserted privilege, we adopt the following procedure. In applying to such proceedings the procedural standards enunciated in the above cases, a witness wishing to claim the privilege must appear, as commanded, and claim the privilege as to each incriminating question. At this point the Commission may seek a judicial determination of the validity of the claimed privilege. To facilitate obtaining a judicial determination, it should not be necessary that the Commission apply to this court. A more expeditious disposition will be had if the Commission requests a judicial determination from the chief judge of the circuit in which the proceeding is being conducted, who will then designate a judge to hear the matter. The witness shall appear before the designated judge, who will then determine whether the assertion of the privilege was justified.

If it appears to the judge that the question, on its face, could reasonably elicit an incriminating response, he can bar the answer even without asking the witness to support his position. (See United States v. Raley (D.D.C. 1951), 96 F. Supp. 495.) However, where a question is innocent on its face, the judge may inquire of the witness as to the origin of the claim that the question might incriminate him, and the burden is on the witness to establish the validity of his claim. (United States v. Weisman (2d Cir. 1940), 111 F.2d 260.) However, the witness is not required to prove the hazard in the sense in which a claim is usually required to be established in court. (Hoffman v. United States (1951), 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814; Russell v. United States (6th Cir. 1926), 12 F.2d 683, cert. denied (1926), 273 U.S. 708, 71 L. Ed. 851, 47 S. Ct. 100; Estes v. Potter (5th Cir. 1950), 183 F.2d 865, cert. denied (1951), 340 U.S. 920, 95 L. Ed. 664, 71 S. Ct. 356.) It need only be established that the answer is likely to incriminate the witness.

In determining the validity of the witness' contention, the court shall take into consideration all of the facts and circumstances of the case. (Mason v. United States (1917), 244 U.S. 362, 61 L. Ed. 1198, 37 S. Ct. 621; Graham v. United States (9th Cir. 1938), 99 F.2d 746.) The witness shall be

allowed to tender whatever proof he wishes to show that an answer might tend to incriminate him. (Alexander v. United States (9th Cir. 1950), 181 F.2d 480; Doran v. United States (9th Cir. 1950), 181 F.2d 489.) If the witness is under investigation in a criminal matter, the judge should pay added consideration to his assertions. Also, close questions should be resolved in favor of the witness. People v. Burkert (1955), People v. Rockola (1931), 346 Ill. 27; People v. Newmark (1924), 312 Ill. 625; see generally 37 Ill. L. & Prac. Witnesses §149, at 158 (1958); 98 C.J.S. Witnesses §54, at 303 (1957).

This procedure provides the necessary judicial determination of the propriety of a claimed privilege against self-incrimination in disciplinary proceedings. It removes from the witness the sole discretion of determining whether or not the privilege can be asserted and whether the questions must be answered.

At this point, the situations before us do not warrant application of the above procedure. As mentioned, before applying this procedure, the claim of the privilege must be properly asserted. Each of the respondents received a subpoena requiring him to appear and testify before the Commission. None of the respondents in question has done so. When served with a subpoena in a disciplinary proceeding which

requests an appearance, the privilege against self-incrimination is not properly claimed by merely failing to appear. (See generally 7A C.J.S. Attorney and Client §94, at 36 (1980); Kanter v. Clerk of the Circuit Court (1903), 108 Ill. App. 287, People v. Burkert (1955), 7 Ill.2d 506; Hoffman v. United States (1951), 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814.) An attorney against whom a disciplinary proceeding is pending does not have a complete immunity from testifying as does a defendant in a criminal case. The attorney must appear as any other witness and assert the claimed privilege as to each incriminating question. (Black v. State Bar (1972), 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288.) The same is true for a subpoena duces tecum. The witness must appear with the papers, and a similar judicial determination must be made as to the propriety of a claimed privilege. See Leahy v. City of Knoxville (1952), 193 Tenn. 242, 245 S.W.2d 772: see generally 98 C.J.S. Witnesses §454, at 304 (1957).

We next consider the extent of the privilege as to these respondents. In addition to the command to appear and testify, the subpoena also commanded respondent Elias to produce all documents relating to certain named clients. Elias conducted business as a sole practitioner.

The applicability of the privilege against self-incrimination to an attorney in his office files was recognized in Bellis v. United States (1974), 417 U.S. 85, 40 L. Ed.2d 678, 94 S. Ct. 2179. In Bellis the United States Supreme Court was asked to decide whether a partner in a three-man partnership could invoke the fifth amendment when asked to produce records of the partnership. Restating well-established concepts, the court concluded that the privilege against self-incrimination extends only to personal communications.

> "[A]n individual cannot rely upon the privilege to avoid producting the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." (Bellis v. United States (1974), 417 U.S. 85, 88, 40 L. Ed. 2d 678, 683, 94 S. Ct. 2179, 2182.)

Thus organizations even as small as a three-man partnership, because of the way in which it carries on business, could take on an identity apart from the individual partners. The court concluded that such a situation had occurred in Bellis. It refused to allow the partner to invoke the privilege in records of the partnership since he only held the papers in a representative capacity.

The key question so far as Elias' privilege regarding office documents is concerned is whether Basil Chris Elias, as an attorney at law, had an identity independent of Basil Chris Elias as an individual. We conclude that he did not. Numerous cases have concluded that the privilege applies to the business records of the sole proprietor or sole pracitioner, as well as to personal documents concerning the individual's private life. (Boyd v. United States (1886), 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524; Couch v. United States (1973), 409 U.S. 322, 34 L. Ed. 548, 93 S. Ct. 611; Stuart v. United States (5th Cir. 1969), 416 F.2d 459.) Thus the scope of respondent Elias' privilege in his business records is identical to the scope of his privilege regarding personal records.

However, the respondent Elias has failed to appear and produce the documents requested by the Commission. The respondent's failure to do so does not constitute a proper way of claiming the privilege.

Like respondent Elias, respondent Zisook received several subpoenas duces tecum for office files of certain named clients. Zisook has also failed to comply with those subpoenas. Unlike respondent Elias, however, Zisook does not engage in the practice of law as a sole practitioner. He is an employee of a professional corporation, Sheldon Oliver Zisook Professional Corporation.

The issue in this regard is whether, like the sole practitioner, an attorney practicing as a professional corporation can claim the privilege against self-incrimination in files of the corporation. The respondent contends that he should be allowed to claim the privilege to the same extent as the sole practitioner. The Commission, on the other hand, argues that similar to an employee of a traditional corporation, he should have no privilege in the records of the corporation. We agree and hold that employees of professional corporations do not possess the privilege against self-incrimination so far as records of the corporation are concerned.

Professional corporations in Illinois are governed by the Professional Service Corporation Act (Ill. Rev. Stat. 1979, ch. 32, par. 415--1). The Act defines the professional corporation as "a corporation organized *** solely for the purpose of rendering one category of professional service *** and which has as its shareholders, directors, officers, agent and employees (other than ancillary personnel) only individuals who are duly licensed by this State *** to render that particular category of professional service *** (except that the secretary of the corporation need not be so licensed)." (Ill. Rev. Stat. 1979,

ch. 32, par. 415--3.4.) Other references in the Act closely align the attributes of a professional corporation to those of a traditional corporation. The Act states:

> "'The Business Corporation Act' filed July 13, 1933, as now or hereafter amended, shall be applicable to professional corporations organized under this Act, and they shall enjoy the powers and privileges and be subject to the duties, restrictions, and liabilities of other corporations, except where inconsistent with the letter and purpose of this Act." Ill. Rev. Stat. 1979, ch. 32, par. 514--4.

Respondent argues that the only reason for the professional corporation structure is to provide a potentially smaller tax liability. The argument continues that since this is the sole similarity to corporations, th professional corporation can hardly be identified with the corporate structure. Such an argument fails to recognize the full range of benefits available to professional corporations. Besides the tax aspect, the professional corporation may issue shares of ownership important in providing alternate means for management and also offers a broad range of benefits not available

in an unincorporated organization. See Hanson, Professional Corporations, 59 Ill. Bar J. 196, 300 (1970).) Thus, in addition to the statutory alignment of professional corporations with traditional corporations, the attributes of the professional corporation and the benefits available under such an organization closely parallel those of a traditional corporation. Riemer, Professional Corporations: An Analysis, 62 L. Q. 151 (1977).

The similarity continues in terms of burdens placed upon the professional corporation. (Riemer, Professional Corporations: An Analysis, 62 Mass. L.Q. 151 (1977); Schmukler, Partnership, Corporation, Sole Proprietorship or Other Form: How Should I Conduct My Practice?, 52 Wis. Bar Bull, 8, 10 (1979); Jorrie & Wolf, Selected Practical Problems With Professional Associations and Professional Corporations, 10 St. Mary's L. J. 247, 268 (1978).) Indeed, it is a failure to adhere to the indicia of corporateness which renders the status of professional corporations vulnerable to attack. (Riemer, Professional Corporations: An Analysis, 62 Mass. L.Q. 151, 156 (1977).) Although a professional corporation may have been established primarily for tax benefits, these aspects clearly demonstrate that the corporateness of the professional corporation is genuine.

This similarity between professional and traditional corporateness has been recognized by the courts in dealing with the question now before us. In Reamer v. Beall (4th Cir. 1974), 506 F.2d 1345, cert. denied (1975), 420 U.S. 955, 43 L. Ed. 2d 431, 95 S. Ct. 1338, the sole employee and stockholder of a professional corporation was found in contempt for failing to obey a grand jury subpoena for the production of certain corporate records. Referring to Bellis v. United States (1974), 417 U.S. 85, 40 L. Ed. 2d 678, 94 S. Ct. 2179, the court stated:

> "'[N]o privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be' ***." (Reamer v. Beall (4th Cir. 1974), 506 F.2d 1345, 1346.)

Thus the defendant in that case could not invoke his fifth amendment rights against self-incrimination to justify the nonproduction of the corporation's records.

A similar position was adopted in United States v. Graham. Although refusing to enforce a subpoena duces tecum on other grounds, the court stated:

> "The financial records of the professional corporation do not in my opinion fall within the protection of the fifth amendment. It is true that the professional corporation is unique and that there is still an individual responsibility for the rendition of services, but the professional corporation is a separate legal entity usually created for tax reasons. If by incorporating tax benefits can be obtained I see no reason why the corporate burdens should not be assumed. I would, therefore, find that even though the investigation is a criminal investigation the corporate records are not protected." (United States v. Graham (D.C. Mont. May 16, 1972), 72--2 U.S. Tax. Cas. (CCH), par. 9,535.)

Also see In re Special Grand Jury No. 1 Impaneled December, 1977 Term (D. Md. 1978), 465 F. Supp. 800.

The application of the fifth amendment privilege as it relates to traditional corporation was summarized in United States v. White (1944), 322 U.S. 694, 88 L. Ed. 1542, 64 S. Ct. 1248. The court stated:

> "Basically, the power to compel the production of the records of any organization, out of the inherent and necessary power of their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." (Emphasis added.) (United States v. White (1944), 322 U.S. 694, 700-01 88 L. Ed. 1542, 1547, 64 S. Ct. 1248, 1252.)

See generally, Comment, Business Records and the Fifth Amendment Right Against Self-Incrimination, 38 Ohio St. L. J. 351 (1977); Note, Fifth Amendment Rights of a Client Regarding Documents Held By His Attorney: United States v. White, 1973 Duke L.J. (1080.

Thus the privilege protects an employee from disclosing his "personal" records which may incriminate him, but it does not protect him from providing corporate records in his possession, which may incriminate him. The distinction between these two is that in the second situation the witness holds the documents in a representative, as opposed to personal, capacity. Bellis v. United States, (1974), 417 U.S. 85, 40 L. Ed. 2d 678, 94 S. Ct. 2179; United States v. Nobles (1975),

422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160; People v. Monroe (1963), 27 Ill.2d 449; see generally Annot., 52 A.L.R.3d 19 (1980 Supp).

Thus, employees of professional corporations have no privilege against self-incrimination in documents of that corporation. (See Lipton & Petrie, Constitutional Safeguards and Corporate Records, New York University Proceedings of the Twenty-Third Annual Institute on Federal Taxation 1315, 1333 (1965).) Respondent Zisook cannot claim the privilege in the corporate files of Sheldon Oliver Zisook Professional Corporation. Of course, any personal papers contained in the files are protected.

In summary, Brody was subpoenaed only to appear and testify. He has refused to appear, claiming his privilege against self-incrimination. This is not a proper way to claim the privilege. He must claim it by appearing and asserting it as to each question he feels may be incriminating and having a judicial determination as above noted.

Elias was subpoenaed to produce documents relating to his practice as an attorney, as well as to appear and testify. He, too, failed to comply on the grounds that it will incriminate him. Although as a sole practitioner his privilege extends to his files and records, he has failed to properly claim the privilege, both as it relates to producing his records and to his giving testimony.

Zisook has been subpoenaed to produce certain documents of a professional corporation, as well as to appear and testify. He has failed to comply. The scope of his privilege does not extend to documents of a professional corporation. Likewise, his failure to appear is an improper manner to assert the privilege as it relates to the command to give testimony.

These disciplinary cases are remanded to the Attorney Registration and Disciplinary Commission with directions that new dates be set for compliance with the subpoenas, and in the event of failure to comply in the manner set forth in this opinion, a report of such failure should be filed with this court as provided in our Rule 754 (73 Ill.2d R. 754).

Cause remanded, with directions.

APPENDIX B

RULE TO SHOW CAUSE

STATE OF ILLINOIS)
) SS.
SUPREME COURT)

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS, IN THE SUPREME COURT OF ILLINOIS

In re:)
)
M. R. 2517) Complaint Under Rule 754
))
SHELDON OLIVER ZISOOK)
)
an Attorney.)

TO: SHELDON OLIVER ZISOOK
Attorney at Law
100 North LaSalle Street
Suite 2400
Chicago, IL 60602

It appearing to the Court that a report under Rule 754 of this Court has been filed by the Administrator of the Attorney Registration and Disciplinary Commission alleging your failure or refusal to attend, testify or produce in response to a subpoena duces tecum;

Now, therefore, the said Sheldon Oliver Zisook is hereby ruled to show cause, in writing, why he should not be suspended from the practice of law until further order of this Court for such failure or refusal.

The answer to this Rule shall be filed in the Office of the Clerk of this Court on or before October 31, 1980.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 30th day of September, A.D. 1980

(S E A L)

/s/ CLELL L. WOODS, Clerk,

Supreme Court of the State of Illinois

RULE TO SHOW CAUSE

STATE OF ILLINOIS)
) SS.
SUPREME COURT)

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS, IN THE SUPREME COURT OF ILLINOIS

In re:)
)
M. R. 2536) Complaint Under
) Rule 754
BASIL CHRIS ELIAS,)
)
an Attorney.)

TO: BASIL CHRIS ELIAS
Attorney at Law
134 North LaSalle Street
Chicago, IL 60602

It appearing to the Court that a report under Rule 754 of this Court has been filed by the Administrator of the Attorney Registration and Disciplinary Commission alleging your failure or refusal to attend, testify or produce in response to a subpoena duces tecum;

Now, therefore, the said Basil Chris Elias is hereby ruled to show cause, in writing, why he should not be suspended from the practice of law until further order of this Court for such failure or refusal.

The answer to this Rule shall be filed in the Office of the Clerk of this Court on or before December 20, 1980.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 20th day of November, A.D., 1980.

CLELL L. WOODS Clerk,

Supreme Court of the State of Illinois

Opposition

Office - Supreme Court, U.S.
FILED
MAY 29 1982

No. 81-2028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE SHELDON OLIVER ZISOOK,

Attorney-Petitioner,

IN RE JEFFREY BRODY,

Attorney-Petitioner,

IN RE BASIL CHRIS ELIAS,

Attorney-Petitioner.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RULE OF THE SUPREME COURT OF ILLINOIS INVOLVED 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

I.

The Petition For Certiorari Should Be Denied Because There Is No Final Judgment Which This Court May Review 4

A. Granting Certiorari Requires A Final Judgment 4

B. There Is No Final Judgment In This Case 4

C. This Case Does Not Come Within One Of The Exceptions To The Final Judgment Rule 6

II.

The Decision Of The Supreme Court Of Illinois That Employees Of Professional Corporations Do Not Possess A Privilege Against Self-Incrimination As To The Records Of The Corporation Is In Accordance With Applicable Supreme Court Decisions 7

III.

The Procedure Established By The Supreme Court Of Illinois By Which An Attorney Must Assert His Or Her Privilege Against Self-Incrimination Is In Complete Compliance With The Procedure Enunciated By This Court 9

IV.

The Procedure Established By The Supreme Court Of Illinois Does Not Infringe On The Petitioners' Fifth Amendment Rights 10

CONCLUSION 11

TABLE OF AUTHORITIES

Alexander v. United States, 181 F.2d 480 (9th Cir. 1950) 10
Bellis v. United States, 417 U.S. 85 (1974) 3, 8
Boyd v. United States, 116 U.S. 616 (1886) 3
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 6, 7
Hoffman v. United States, 341 U.S. 479 (1950) 3, 5, 9, 10
In re Zisook, 430 N.E.2d 1037 (Ill. 1981) 8, 9
Mower v. Fletcher, 114 U.S. 127 (1885) 4
People v. Rockola, 346 Ill. 27 (1931) 10
Radio Station WOW v. Johnson, 326 U.S. 120 (1944) 6
United States v. Gomez-Rojas, 507 F.2d 1213 (5th Cir.), *cert. denied*, 423 U.S. 826 (1975) 5
United States v. Malnik, 489 F.2d 682 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974) 5
United States v. Raley, 96 F.Supp. 495 (D.D.C. 1951) 9
United States v. Weisman, 111 F.2d 260 (2nd Cir. 1940) 9
United States v. White, 322 U.S. 694 (1943) 8
Uphaus v. Wyman, 360 U.S. 72 (1958) 6
Wilson v. United States, 221 U.S. 361 (1910) 3, 8
Rules of the Supreme Court of Illinois, Rule 766 . 11

In The

Supreme Court of the United States

October Term, 1981

IN RE SHELDON OLIVER ZISOOK,

Attorney-Petitioner,

IN RE JEFFREY BRODY,

Attorney-Petitioner,

IN RE BASIL CHRIS ELIAS,

Attorney-Petitioner.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

RULE OF THE SUPREME COURT OF ILLINOIS INVOLVED

Rule 766. Confidentiality of Proceedings

The proceedings before the Inquiry, Hearing and Review Boards (other than reinstatement hearings under Rule 767) shall be private and confidential subject, however, to the following exceptions:

1. Upon the request of the Secretary of the Clients' Security Fund of the Illinois Bar, the Administrator may advise the Secretary of the pendency and result of

any investigation or proceeding involving an attorney whose conduct is the subject of a claim against the Fund. That advice may include all records of investigations or proceedings, transcripts of testimony, statements and other evidence in the possession of the Administrator.

2. At any time after a petition for suspension upon conviction of a crime has been filed pursuant to Rule 761, the Administrator, upon inquiry, may confirm that a petition has been filed.

3. At any time after a complaint or petition under these rules has been filed with the Hearing Board, and with the approval of the Court or a member thereof, the Administrator may disclose that the proceeding is pending and describe its general nature. Disclosure may be made only to a complainant or other person who makes a clear showing to the Administrator that he would be prejudiced by not having the information.

4. Where there has been a public disclosure of allegations which, if true, could result in discipline, the Administrator, with the approval of the Court or a member thereof, and in the interest of the public and the legal profession, may disclose:

(a) whether the matter is being investigated;
(b) whether a complaint or petition has been filed with the Hearing Board;
(c) the result of any hearing and review of the matter.

5. At the request of the respondent, the proceedings shall be public.

73 Ill.2d R. 766.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, petitioners have not properly asserted their Fifth Amendment right against self-incrimination. They have not claimed the right in response to any specific question posed by the Commission. Consequently, there has been no ruling by the Supreme Court of Illinois as to whether their privilege is available. Without such a ruling, there is no final judgment from which this Court may take jurisdiction pursuant to 28 U.S.C. § 1257(3).

Second, the holding of the Supreme Court of Illinois in this case is in accord with the decisions of this Court. The Supreme Court of Illinois held that employees of professional corporations do not possess a privilege against self-incrimination as to the records of the corporation. This Court has held that the privilege is a personal one. *Boyd v. United States*, 116 U.S. 616 (1886). As such, it is unavailable to an employee as to corporate records, *Wilson v. United States*, 221 U.S. 361 (1910), because such records are held in a representative rather than a personal capacity. *Bellis v. United States*, 417 U.S. 85 (1974).

Third, the procedure established by the Supreme Court of Illinois by which an attorney must assert the privilege against self-incrimination is in compliance with requirements established by this Court. The Supreme Court of Illinois outlined a procedure for asserting the privilege against self-incrimination which is in accord with *Hoffman v. United States*, 341 U.S. 479 (1951). There is no indication that the procedure, as applied, will violate petitioners' constitutional rights.

ARGUMENT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO FINAL JUDGMENT WHICH THIS COURT MAY REVIEW.

A. Granting Certiorari Requires A Final Judgment.

Petitioner invokes jurisdiction of this Court under 28 U.S.C. § 1257(3) (1970). That statute grants this Court power to review state litigation only after "the highest Court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree." *Id.*

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case . . . [N]othing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered." *Mower v. Fletcher*, 114 U.S. 127, 128 (1885).

B. There Is No Final Judgment In This Case.

The Attorney Registration and Disciplinary Commission (Commission) commenced investigations of each of the petitioners. Pursuant to the Commission's investigations, petitioners each received a subpoena to testify before the Commission. Petitioners Zisook and Elias received subpoenas duces tecum requesting the production of certain documents. Each petitioner, through his attorney, informed the Commission that he believed that such testimony or production of documents would tend to incriminate him. Petitioners failed to appear before the Commission at the appointed time. The Commission filed a report with the Supreme Court of Illinois pursu-

ant to Rule 754 (73 Ill.2d R. 754). The Court issued a rule to show cause. The petitioners answered the rule to show cause and the cases were briefed and orally argued. The Court rendered an opinion setting forth the proper procedure for asserting the privilege against self-incrimination and describing the scope of the privilege. The disciplinary cases were remanded to the Commission with directions for further proceedings in accordance with the opinion.

In *Hoffman v. United States*, this Court enunciated the standard by which an individual may properly assert the privilege against self-incrimination:

> . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

Id., 341 U.S. 479, 486-487 (1950).

In order to properly apply this standard, it is necessary that specific questions be asked and the claim of right against self-incrimination be asserted in response to each. Without this the court would have to accurately anticipate each question in order to rule on the privilege. *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974). A blanket declaration by the witness that he cannot answer for fear of self-incrimination is insufficient to invoke the privilege. *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975).

The question must be asked before the petitioner can claim his right against self-incrimination. Until the

lower court has ordered the petitioner to testify or to produce, there is no final judgment pursuant to which this Court may take jurisdiction. *Uphaus v. Wyman*, 360 U.S. 72, 75 (1958).

C. This Case Does Not Come Within One Of The Exceptions To The Final Judgment Rule.

Although the definition of the final judgment implies a mechanical rule, this Court has never administered the rule in such a fashion. *Radio Station WOW v. Johnson*, 326 U.S. 120, 125 (1944). The Court has recognized four categories of cases in which a decision on the federal issue has been treated as a final judgment for purposes of 28 U.S.C. § 1257. The Court has taken jurisdiction in these cases even though additional proceedings in lower state courts had not been completed. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1974).

The first category includes cases in which there are further proceedings pending in the state courts, but the federal issue is conclusive or the outcome of the proceedings is preordained. *Id.* at 479. This exception is not applicable to the present case as petitioners' right to assert the privilege against self-incrimination can only be determined on a question by question basis.

In the second category are cases in which the federal issue will require decision regardless of the outcome of anticipated state court proceedings. Nothing could happen in the state court proceedings which would foreclose decision on the federal issue. This exception is not applicable because it is the federal right on which the lower courts have yet to rule. "[W]here remaining litigation may raise other federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews." *Radio Station WOW*, 326 U.S. at 127.

In the third category are cases in which later review of the federal issue will not be available because it will be mooted or the petitioner would be precluded from raising it again. *Cox* at 481. Later review of a ruling by the lower court on petitioners' claim of right against self-incrimination will be available as they will not be precluded from raising it again. Indeed, such ruling is necessary to provide a final judgment if petitioner is to properly seek review by this Court.

In the final category are cases in which a decision on the federal issue would be "preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state court proceedings still to come." *Id.* at 482-483. A decision on the federal issue in this case will not be preclusive of further litigation in the state court as the right against self-incrimination cannot be determined on a hypothetical basis. Until a question has been asked and the right asserted in response, there is no basis for deciding whether the privilege is available to the petitioner.

Therefore, since there is no final judgment in the instant case and none of the exceptions to the final judgment rule are applicable, this Court should deny certiorari on the basis that it lacks jurisdiction under 28 U.S.C. § 1257(3).

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS THAT EMPLOYEES OF PROFESSIONAL CORPORATIONS DO NOT POSSESS A PRIVILEGE AGAINST SELF-INCRIMINATION AS TO THE RECORDS OF THE CORPORATION IS IN ACCORDANCE WITH APPLICABLE SUPREME COURT DECISIONS.

The privilege against self-incrimination is a personal one. It applies only to natural individuals. It protects

them from the compelled production of private papers as well as compelled oral testimony. *Boyd v. United States*, 116 U.S. 616 (1886). Since the privilege is a purely personal one, it does not extend to the records of a collective entity which an individual holds in a representative capacity. Such records and documents cannot be the subject of the individual's privilege against self-incrimination even though production of the papers or documents might tend to incriminate the individual personally. *United States v. White*, 322 U.S. 694, 699 (1943). This Court has long held that an officer or employee of a corporation cannot refuse to produce corporate records or documents on the basis of the privilege against self-incrimination. *Wilson v. United States*, 221 U.S. 361, 386 (1910).

The Supreme Court of Illinois held that Petitioner Zisook, as an employee of a professional corporation, cannot assert the privilege against self-incrimination as to the records of the corporation. The Court specifically noted that the privilege protects an employee of a corporation from disclosing his personal records which may incriminate him, but it does not protect him from providing corporate records in his possession. The privilege is inapplicable to the latter records because they are held in a representative rather than a personal capacity. *Bellis v. United States*, 417 U.S. 85 (1974). The Court specifically excepted any personal papers which might be contained in the files. *In re Zisook*, 430 N.E.2d 1037, 1046 (Ill. 1981).

Petitioner Zisook has chosen to do business as a professional corporation. The record and documents sought by the subpoena issued to petitioner Zisook are those of the corporation. As to such corporate records and documents, petitioner Zisook has no claim of right against self-incrimination. This holding is in accord with the decisions of the Court.

III.

THE PROCEDURE ESTABLISHED BY THE SUPREME COURT OF ILLINOIS BY WHICH AN ATTORNEY MUST ASSERT HIS OR HER PRIVILEGE AGAINST SELF-INCRIMINATION IS IN COMPLETE COMPLIANCE WITH THE PROCEDURE ENUNCIATED BY THIS COURT.

When a witness claims the privilege against self-incrimination, this Court has stated that it is not for the witness alone to decide whether a matter is incriminating, but for the court to decide whether the witness' fear of incrimination is well founded. *Hoffman*, 341 U.S. 479. Likewise, the Supreme Court of Illinois has stated that when a witness appears before the Commission and claims the privilege, the Commission may seek a judicial determination of the validity of the asserted privilege. *Zisook*, 430 N.E.2d at 1042.

In order to obtain an expeditious determination, the Commission may request that the chief judge of the circuit in which the proceeding is being conducted consider the matter. *Id.* The chief judge will then designate a judge to hear the matter. The designated judge must "be governed as much by his personal perception of the peculiarities of the case, as by the facts actually in evidence." *Hoffman* at 487.

The witness shall appear before the designated judge, who will then determine whether the assertion of the privilege was justified. *Zisook* at 1042. If it is apparent that the question, on its face, could reasonably elicit an incriminating response, the judge will not require the witness to answer. *United States v. Raley*, 96 F.Supp. 495 (D.D.C. 1951). On the other hand, if the question is innocent on its face, the witness must establish the validity of the claim. *United States v. Weisman*, 111 F.2d 260 (2d Cir. 1940).

Even though the witness is not required "to prove the hazard in the sense in which a claim is usually required to be established in court," *Hoffman* at 486, the witness should offer proof, in whatever form he or she wishes, to show that an answer might tend to be incriminating. *Alexander v. United States*, 181 F.2d 480 (9th Cir. 1950). In addition, if the witness is under investigation in a criminal matter, the judges should give added consideration to the witness' assertions and resolve close questions in the witness' favor. *People v. Rockola*, 346 Ill. 27 (1931).

The procedure directly complies with the requirements for asserting the privilege against self-incrimination as established by this Court and other courts. Petitioners argue that the Supreme Court of Illinois has placed a greater burden of proof upon them in asserting that privilege. *Petition* at 42. This argument is premature. The procedure has not been applied in the instant case as the petitioners have not appeared before the Commission. The procedure outlined by the Supreme Court of Illinois is in accordance with the decisions of this Court. There is no indication that, in application, a greater burden of proof will be imposed upon the petitioners.

IV.

THE PROCEDURE ESTABLISHED BY THE SUPREME COURT OF ILLINOIS DOES NOT INFRINGE ON THE PETITIONERS' FIFTH AMENDMENT RIGHTS.

The procedure established by the Supreme Court of Illinois by which an attorney's assertion of the privilege is reviewed by a circuit court judge wi.l not result in any attorney sacrificing his Fifth Amendment rights in order to establish them pursuant to that procedure. Petitioner's argument to the contrary, *Petition* at 50, is premature.

Since the petitioners in this case have not appeared before the Commission and asserted the privilege, the procedure established by the Court has not been applied. The judge who reviews the validity of the witness' assertion of the privilege will take whatever steps are necessary to protect the witness' Fifth Amendment rights. There is no indication to the contrary in the decision by the Supreme Court of Illinois.

The Rules of the Supreme Court of Illinois which govern the Commission provide for the confidentiality of proceedings before the Inquiry, Hearing and Review Boards of the Commission. S.Ct.R. 766 (1976). Any documents or testimony by the witness relating to his assertion of the privilege would be protected from public disclosure.

There is no indication that the petitioners' constitutional rights will be violated.

CONCLUSION

For the reasons set out above, respondents respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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